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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., *et al.*,
Petitioners,

v.

DELORES SCOTT SULLIVAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The National Association of Waterfront Employers ("NAWE") is a not for profit tax-exempt trade association organized under the laws of the District of Columbia.[1]

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[1] Pursuant to Supreme Court Rule 37.3, a blanket letter of consent on behalf of both Petitioners and Respondents has been filed with the Clerk of the Court on October 22, 1998. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored the brief in whole or in part and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

NAWE's 35 members are private sector stevedores and marine terminal operators who operate in over 100 ports in the United States on all three coasts, the Great Lakes, and the Commonwealth of Puerto Rico. Every NAWE member company employs longshore labor engaged in maritime employment subject to the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"), other than those members operating in Puerto Rico.

The Master Contracting Stevedore Association of the Pacific Coast ("MCSA") is a not-for-profit trade association whose 15 member private sector companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the maritime terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in these states. Every MCSA member company employs longshore labor engaged in maritime employment subject to the federal LHWCA.

Signal Mutual Indemnity Association, Ltd. is the largest self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

A district court in the Third Circuit has now extended the state action doctrine to cover private employers making benefit decisions under the federal LHWCA. *See Kreschollek v. Southern Stevedoring*, Civil No. 93-3903 (JHR), Order (D.N.J., Sept. 30, 1997). NAWE is a party to that litigation on behalf of its member companies. *Kreschollek* was brought under the Fifth Amendment Due Process clause and involves a facial challenge to a federal statute and federal regulations brought, in part, against a private entity, Southern Stevedoring Company.

Amici submit that this Court's answer to the questions accepted for review will have a direct effect on the 27,000+ benefit decisions made each year by self-insured employers and/or insurance carriers subject to the

LHWCA. The self-insured employer-members of NAWE and the MCSA, along with all of the members of Signal Mutual Indemnity Association, Ltd., together comprise a substantial portion of the employers subject to the jurisdiction of the LHWCA. These employers will be faced with making many of these financially burdensome decisions.

Because *Amici* believe that the answer to the first question should be dispositive and will address the source of confusion in the lower courts, *Amici* have limited this brief to addressing that question.[2]

SUMMARY OF ARGUMENT

Amici believe that this Court need look no further than its holdings in *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) to find that the Petitioners in this case are not state actors. However, *Amici* believe that this Court should not end its inquiry there, but instead should take this opportunity to review the confused state action doctrine in its entirety.

The "traditional government function" and "government coercion" theories of state action are not the source of the confusion, at least to the extent those theories are considered distinct lines of cases. The confusion arises from the "government cooperation" theory of state action when viewed through the prism of the *Burton v. Wilmington Parking Authority*, 363 U.S. 715 (1961) fact-dependent inquiry. Not surprisingly, when turned loose with a concept as nebulous as government cooperation or participation and told that it is a fact-bound inquiry, the lower courts are bound to reach some erroneous conclusions, as evidenced by the decision below.

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[2] The first question presented is "Whether private companies providing workers' compensation insurance to private employers become 'state actors' for purposes of the Due Process Clause when they elect to use a state-authorized utilization review procedure."

This case should be characterized as a "government participation" type of state action case. *Amici* urge this Court to review its prior holdings in this area and to finally establish a clear test for what constitutes sufficient government participation to invoke the state action doctrine.

ARGUMENT

I. THE CONSTITUTION GIVES PRIVATE CITIZENS THE FUNDAMENTAL RIGHT NOT TO BE SUBJECT TO THE SAME RESTRICTIONS IMPOSED ON STATE ACTORS

The Constitution authorizes a national government, while at the same time confining the actions of that national government, with regard to certain individual liberties and other specified matters. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). The Constitution also confines some actions of the states. *Id.* These same restrictions do not apply to private citizens.[3]

> With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1978). This fundamental limitation on the scope of constitutional guarantees "preserves an area of individual freedom by limiting the reach of the federal law" and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982). One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

Edmonson, 500 U.S. at 619.

[3] *Amici* use the phrase "private citizen" in its broadest sense to encompass individuals, as well as other private entities such as partnerships, corporations, organizations, etc.

To the extent the federal courts expand the "state action doctrine" to cover private conduct, they deny private citizens a fundamental right guaranteed under the Constitution. The constitutional right of private citizens to not be subject to the constitutional constraints imposed on government is as important a fundamental right as are the rights to free speech, free association and counsel. Such a fundamental right should not be limited by the courts without a sound textual and public basis for that limitation.

II. THE CURRENT STANDARD FOR WHAT CONSTITUTES STATE ACTION MUST BE REPLACED

The federal courts have struggled for more than one hundred years with the question of where the governmental sphere ends and where the private sphere begins. *See The Civil Rights Cases*, 109 U.S. 3 (1883). This Court has articulated a number of approaches to this constitutional question. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), this Court held that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

In *Edmonson*, this Court reiterated that the determination of what constituted state action was a "fact-bound inquiry." *Edmonson*, 500 U.S. at 621. *Edmonson* held that two questions must be answered:

> We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.

Edmonson, 500 U.S. at 620 (internal citations omitted).

The problem inherent in the "fact-bound" *Burton* inquiry is that no decision is ever controlling on future cases unless the facts presented are exactly the same.

The *Burton* approach leaves each succeeding court free to assess the equities anew, as the Third Circuit Court of Appeals has done in the present case. In the modern, highly regulated world, almost any private commercial or employment-based transaction that contemplates a state established dispute resolution process can be construed as "state action." Such an approach destroys the fundamental constitutional freedom of private citizens not to be subject to the same constitutional burdens as government.

As long as the *Burton* approach is alive, each state action decision of this Court is subject to being "treated like a restricted railroad ticket, 'good for this day and train only.'" *County of Washington, Oregon v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944)) (Roberts, J., dissenting). Such an approach leaves private citizens in the dark as to what private conduct may subsequently be held by a court to be state action subject to constitutional scrutiny. As the law currently stands, citizens have no basis for predicting when their apparently private conduct might subject them to civil liability or even, in theory, to criminal liability. See 42 U.S.C. § 1983; 18 U.S.C. § 241 *et seq.*

This Court has acknowledged the problem, describing state action decisions as "difficult terrain," *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995), and as "not a model of consistency." *Id.* at 378 (quoting *Edmonson*, 500 U.S. at 632) (O'Connor, J., dissenting). Indeed, this Court alluded to the problem in 1982, when it said:

> [T]he Court has articulated a number of different factors or tests in different contexts * * * Whether the different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here.

Lugar, 457 U.S. at 939.

The state action doctrine has now reached its illogical extreme in the lower courts—i.e., facial challenges to statutes and regulations being brought against private parties.[4] *Amici* respectfully submit that the time is ripe for this Court to revisit the standard used to evaluate "state action" and to establish a clearer and more definite test.

III. THE PETITIONERS SHOULD NOT "BE DESCRIBED IN ALL FAIRNESS AS A STATE ACTOR"

In *Edmonson*, this Court described the second aspect of the "state action" inquiry as "whether the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson*, 500 U.S. at 620. *Edmonson* went on to proscribe three areas of judicial examination relevant to answering this question:

> Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.

Edmonson, 500 U.S. at 621-22 (internal citations omitted). Consistent with *Edmonson*, this Court's decisions on "state action" can be separated into three distinct categories: (1) traditional government function cases; (2) government coercion cases; and (3) government participation cases.

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[4] While the Third Circuit did not characterize Respondents' challenge in this case, it appears to be a facial challenge. *Sullivan v. Barnett*, 139 F.3d 158 (3rd Cir. 1998). *See also Keschollek v. Southern Stevedoring Co.*, 78 F.3d 868 (3rd Cir. 1996) (facial challenge to federal LHWCA and its associated regulations brought against a private stevedoring company).

As discussed in detail below, *Amici* believe that the state-action cases should be read as describing three distinct *independent categories* of state action, as opposed to *interdependent factors* to be considered collectively. It is illogical to treat these distinct types of state action as ingredients for a mixing bowl—take a little bit of "almost traditional government function," add it to a pinch of "approaching government coercion," then sprinkle on a smidgen of "government participation," mix it all together, and *voila*, out comes state action. This mixing bowl approach is a recipe for disaster. It can only lead to the type of confusion that now exists in the lower courts, as evidenced by the Court of Appeals in this case.

Amici submit that no amount of government coercion or government participation can transform a function that is not a traditional government function into a function that is a traditional government function for state-action purposes. In the same light, if government coercion of private actions is sufficient to create state action, that state action exists regardless of whether the private action involves a traditional government function or not. That is not to say that analysis of all three lines of cases will not be necessary under some circumstances or that a given case might not involve more than one type of state action. However, each of these three types of state action should stand on their own, each independent of the other.

A. Petitioners Should Not "Be Described In All Fairness As A State Actor" Because Petitioners Were Not Performing A Traditional Government Function

In a long line of cases, this Court has found that some functions are so public in their nature that when performed by private actors, the private actors cannot avoid the constitutional responsibilities of state actors. *Nixon v. Condon*, 286 U.S. 73 (1932) (election); *Smith v. Allwright*, 321 U.S. 649 (1944) (election); *Marsh v. State of Alabama*, 326 U.S. 501 (1946) (company town);

Terry v. Adams, 345 U.S. 461 (1953) (election); *Evans v. Abney*, 396 U.S. 435 (1970) (municipal park).

Amici submit that this Court's jury selection cases should also be characterized as traditional government function cases since providing a jury is a function traditionally performed exclusively by government. *Edmondson*, 500 U.S. at 624-25 (peremptory challenges to jury members in civil litigation); *Georgia v. McCollum*, 505 U.S. 42 (1992) (defendant's challenge to jury members in criminal litigation).

The traditional government function line of cases appears to be supported by the sound public policy that a state should not be able to circumvent its constitutional obligations by allowing private individuals to act in place of the government. When a government allows private parties to assume functions that are traditionally the exclusive parlance of government, the private party steps into the shoes of government. Under such circumstances, both the government and the private party are on notice that they will be held to the constitutional standards of state actors.

To meet the test for a traditional government function, the activity must be "traditionally the *exclusive* prerogtive" of government. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (citations omitted) (emphasis in original). This Court has found that a number of private actions do not fall within the very narrow bounds of a traditional government function. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (utility services); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (shopping centers); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (U.S. Olympic Committee).

Of these cases, the *Jackson* decision is perhaps the most instructive as to how narrow the "traditional government

function" test should be construed. The fact that a private action is heavily regulated or is performed by a monopolist does not make the private action a government function, even if that monopolist is so powerful as to impose its will on the state. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 198-99 (1988).

> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

Jackson, 419 U.S. at 358. The fact that a private activity could be or has been performed by government does not make that private activity an essential government function. *Id.* at 354 n.9. Finally, the fact that a private activity affects a public interest does not make it an essential government function. *Id.* at 354.

In the case at hand, no colorable argument can be made that compensating private individuals for injuries that are sustained in a private workplace is "traditionally the *exclusive* prerogative" of government. *San Francisco Arts*, 483 U.S. at 544. While it is true that this private dispute—like almost all private disputes—has traditionally been mediated by government, government mediation alone cannot transform a private dispute into a traditional government function. *Jackson*, 419 U.S. at 357.

Because the Petitioners were not performing a traditional state function, their private decisions concerning

the provision of workers' compensation benefits can only be considered state action if their decisions were the result of government coercion or government assistance.

B. Petitioners Should Not "Be Described In All Fairness As A State Actor" Because Petitioners Were Not Coerced By The Government Into Acting

In a second line of cases, this Court has held that private parties are state actors when they undertake actions under government compulsion. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (court enforced restrictive property covenant); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (compulsory segregation of private eating establishment); *Lombard v. State of Louisiana*, 373 U.S. 267 (1963) (police chief's official command directed continuance of segregated service); *Robinson v. State of Florida*, 378 U.S. 153 (1964) (compulsory segregation of restroom in private facility); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (state law requiring compliance by club with provisions of its constitution and bylaws containing racially discriminatory provisions); (*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (mandatory drug testing).

The government coercion line of cases also appears to be supported by sound public policy. Government should not be able to circumvent its constitutional obligations by compelling private individuals to act on the government's behalf. Government should not be able to do indirectly through private surrogates what it cannot do directly under the Constitution. The "traditional government function" theory places the private party in the shoes of the government, while the "government coercion" theory places the government in the shoes of the private party. Again, when government orders private action, both the government and the private party are on notice that they will be held to the constitutional standards of state actors.

For government coercion to exist, the government must do significantly more than authorize the private conduct, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (private action authorized by state law), or subsequently ratify the decision, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974):

> Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment.

For government coercion to exist, the government must dictate or at least actively weigh-in in favor of the course of action.

In the case at hand, no colorable argument can be made that the private workers' compensation carriers were coerced into the actions that were taken. Quite the contrary. The decision as to whether to challenge medical services as reasonable and necessary was purely discretionary. The government expressed no view and had no interest in this private decision. The fact that the private carriers' discretionary decisions were ultimately subject to government review in no way converts those private discretionary decisions into government coerced actions.

Because the Petitioners were not coerced into action by government, their private decision concerning workers' compensation benefits can only be considered state action if the decisions were the result of significant government participation.

C. Petitioners Should Not "Be Described In All Fairness As A State Actor" Because Petitioners Were Not Acting In Concert With the Government

This Court has stated, but has rarely held, that private, discretionary actions that do not involve traditional governmental functions and have not been coerced, nonetheless can rise to the level of state action if the government is sufficiently entangled in the decision:

> We have held once, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes.

Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 378 (1995). With the exception of this Court's holding in *Burton*, the other participation cases appear to be limited to situations where a government official was directly involved in assisting one private party to obtain the private property of another. *Lugar v. Edmondson Oil Co.*, 445 U.S. 922 (1982);[5] *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) (state appointed trustee, complying with court ordered notice requirements);[6] *Soldal v. Cook County, Illinois*, 506 U.S. 56 (1992) (deputy sheriff assists with the private seizure of property).

On the other hand, it is easy to identify a list of cases that did not involve sufficient government entanglement

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[5] It is difficult to reconcile *Lugar* with this Court's more recent holding in *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), where the state had significantly more discretion in its actions, other than on the grounds that *Lugar* involved real property while *Tarkanian* involved employment.

[6] While *Pope* appears to have been characterized as an entanglement case, it is hard to identify the discretion in the conduct since the trustee was selected by the court, and the type of notice was then proscribed by the court pursuant to state law. *Pope*, 485 U.S. at 487-88. Therefore, *Pope* could be characterized as a government compulsion case.

to constitute state action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (liquor license for private club); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (warehouseman's sale pursuant to the UCC of entrusted goods); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (transfer of Medicaid nursing home patients when state paying for services); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (private organization ordered discipline of state employee).

This Court has consistently held that private use of government-sanctioned remedies or procedures do not rise to the level of state action. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991); *Pope*, 485 U.S. at 485; *Lugar*, 457 U.S. at 922. Furthermore, state action does not exist merely because the state provides some general support.

> Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and adhered to in subsequent decisions.

Moose Lodge, 407 U.S. at 173. And as discussed above, the government regulation of conduct, and even a government granted monopoly does not transform private conduct into state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). The Government may subsidize private entities without assuming constitutional responsibility for their actions. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1011, (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

In the case at hand, there is no evidence of the type of government participation that this Court has required to support a holding of state action. The Petitioners have done little more than execute a purely discretionary act

in which the state expressed no opinion and had no interest. Petitioners' discretionary actions were taken in accordance with state law and there is no evidence that the state law was more extensive than the law in *Jackson* (regulated private utility) or *Blum* (regulated nursing home). Even if the decision here were made in a more highly regulated environment, that fact still would not make the private decision state action. *Jackson*, 419 U.S. at 350.

D. A Private Party Who Acts In Good Faith In Accordance With The Laws As Written By The Government Should Not "Be Described In All Fairness As A State Actor"

As a bottom line, there appears to be no basis under this Court's prior holdings to conclude that the actions of the Petitioner are state actions. Nevertheless, a lower court is free to reach a different conclusion as long as each state action decision of this Court is subject to being "treated like a restricted railroad ticket, 'good for this day and train only.'" *County of Washington, Oregon v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944)) (Roberts, J., dissenting).

Amici respectfully submit that this Court should go beyond overturning the Court of Appeals' decision in this case. It should clarify the constitutional tests for determining what constitutes state action. *Amici* urge two clarifications. First, as previously stated, *Amici* urge this Court to clarify that "traditional government function," "government coercion" and "government participation" are three distinct and separate types of state action. These types of state action are not factors to be sifted, weighed and mixed together.

Second, *Amici* urge this Court to adopt a clear test for what constitutes state action. *Amici* believe that the problem with the current state action test stems from the

vagueness of the "government participation" concept, as opposed to the "traditional government function" and "government coercion" concepts of state action.

The test for what constitutes sufficient "government participation" to trigger the state action doctrine should encompass three basic principles: (1) the government and the private party must act contemporaneously; (2) the government and private party must share a common purpose in their actions; and (3) there should be no adequate remedy against the government itself.

Such an approach would clearly exclude all private efforts to comply with government legislative and regulatory requirements from consideration as "government participation" [7] because they do not occur contemporaneously and usually do not have the same purpose. This approach would also exclude government provided dispute resolution as a potential source of "state action."

As previously discussed, the public policy behind the "traditional government function" and "government coercion" holdings are readily apparent. The same is not true for the "government participation" theory outside the limited context of property seizure. Unlike the "traditional government function" and "government coercion" theories of state action, the "government participation" theory would appear to have little role in deterring government entities from attempting to circumvent their constitutional obligations.

Applying the "government participation" theory of state action outside the narrow confines outlined above creates the very real possibility of punishing private citizens for the "crime" of complying with the law, as in the present case. If the test for "government participation" is not clearly drawn, a private party, acting in good faith and in accordance with laws duly adopted by the govern-

[7] Such actions could still be considered under the tests for "traditional government function" and "government coercion."

ment, may nonetheless be subject to civil and, in theory, criminal liability, court costs, and in some cases attorney's fees. This liability may vest without any prior notice that the private party's actions were sanctionable.

Furthermore, the "government participation" theory of state action is, by and large, unnecessary. To the extent a private party believes that a government statute or regulation violates fundamental constitutional rights, that private party can always bring a challenge against the government that wrote the law in the form of either a facial or an as applied challenge. The government that wrote the law is in the position to repeal, amend or clarify the law, if necessary. A private party defendant can take none of these actions. For this reason, when a remedy is available against the government that wrote a statute or regulation, it can never be fair to hold a private citizen responsible for the government's action.

In response to the Court's inquiry into "whether the private party charged with the deprivation could be described in all fairness as a state actor?" *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991), *amici* respectfully submit that the answer must be an emphatic "no" when the private actor is doing nothing more than complying in good faith with the laws as written by government entities.

CONCLUSION

For the reasons stated herein, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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